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INTRODUCTION

The behavior of any Justice may be in part determined by how he perceives the Supreme Court's institutional role within the political system. Justice Sherman Minton very definitely had trenchant views on the institutional role of the Supreme Court in American government, and on the function of the judge in the judicial process as well.

Justice Minton believed that the Supreme Court's role in American government is circumscribed by the classic theory of the separation of powers. Although he acknowledged that the Constitution prohibits the executive and legislative branches from certain kinds of activities, he was inclined to resolve questions as to the legitimacy of executive or legislative acts in favor of their constitutionality. If he was satisfied that the legislature had the power to act, he would not dispute the wisdom of the legislation, absent an express prohibition in the Constitution. In effect, he adhered to the view that the executive, legislative, and judicial branches ought to be completely independent of one another. He did not interpret the separation of powers to mean, in practice, that the Constitution provided for the sharing of powers among the three branches of government.[1] As one of his law clerks stated:

> He drew a very tight line between the legislative branch and the executive branch, and was inclined to feel that a court had no role to play other than to sustain the authority of the other two branches in any conflict situation.[2]

While on the Supreme Court, Justice Minton may have personally agreed with his former Senate ally in the Court-packing fight, Justice Hugo L. Black, more often than his voting record indicated. Occasionally he expressed disapproval in his opinions of the litigants who benefited from his votes.[3] He remained nonetheless persuaded that the paramount consideration in constitutional cases was the role of the

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[1] Questionnaire reply from one of Justice Sherman Minton's law clerks.

[2] *Id.* *See also* Justice Minton's dissenting opinions in Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952), and in Terry v. Adams, 345 U.S. 461 (1953).

[3] *Cf.* G. SCHUBERT, THE JUDICIAL MIND 236–72 (1965). Schubert characterizes Justice Minton's ideological commitments as "dogmatically conservative." *Id.* at 264–66.

Supreme Court vis-à-vis the representative branches of government.[4] One law clerk concluded:

> The predominant view entertained by Justice Minton in constitutional cases was that of judicial restraint. This applied in the civil liberties area as well as in the area of economic and social legislation. While he continued to be a New Deal liberal in his personal views, and his votes as a Senator on much of the restrictive legislation that grew out of the McCarthy era probably would not have differed from those of Mr. Justice Black, just as they almost always voted the same way while they were both Senators, Justice Minton did not think that the Constitution should be interpreted to prohibit the Congress from enacting contrary views into law. Of course, he recognized that the Constitution imposed some limits, but in general he believed that the Congress should be allowed great leeway in deciding what the law should be.[5]

As a member of a majority coalition in most major cases involving alleged subversive activities, Justice Minton typified the dominant mood within the Court. His behavior in this area of constitutional law followed predictably from his conception of the Court's relationship with the representative branches of government. He declined to re-evaluate legislative policy choices if he was satisfied there was a sufficient constitutional basis for national security legislation, a limitation he did not read narrowly. As is known from Justice Burton's conference notes from the decision in *Communist Party of the United States v. Subversive Activities Control Board*,[6] Justice Minton believed emphatically that "Congress did not have to stand by"[7] if it perceived a Communist threat to national security.

National Security and Federal-State Relations

Two frequently cited cases typify Justice Minton's reaction to legislative efforts within the states to control Communist activities. The first of these cases, *Adler v. Board of Education*,[8] was decided in a time of national difficulty. During the Korean war, persons accused of Communist affiliations in the United States were often beset with a reversal

[4] Questionnaire reply from one of Justice Sherman Minton's law clerks.

[5] Justice Harold H. Burton's Conference notes re Communist Party of the United States v. Subversive Activities Control Bd., 351 U.S. 115 (1956), undated (The Harold H. Burton Papers, Library of Congress). Justice Minton's views toward many national security issues were not dissimilar from those of Justice Burton. *See* Atkinson, *American Constitutionalism Under Stress: Mr. Justice Burton's Response to National Security Issues*, 9 Hous. L. Rev. 271 (1971).

[6] 351 U.S. 115 (1956).

[7] Burton Notes, *supra* note 5.

[8] 342 U.S. 485 (1952). *But see* Keyishian v. Board of Regents, 385 U.S. 589 (1967).

of the presumption of innocence. On the other hand, there was testimony from many sources indicating increased activities by the American Communist Party and its sympathizers. Acting in response to popular concern, antisubversion legislation was enacted in several states. Amid division on the Court, Justice Minton consistently supported the propriety of state antisubversion legislation against allegations that the individual's rights of freedom of speech and due process of law were being infringed.

In the second illustrative case, *Pennsylvania v. Nelson*,[9] Justice Minton concurred in Justice Reed's dissent, which denied that state antisubversion legislation had been pre-empted by federal security legislation. In both cases Justice Minton indicated his support for strong governmental regulation over subversive elements within the country.

New Strands in the Mesh

In *Adler*, the constitutionality of the so-called Feinberg law[10] was at issue. The New York legislature had passed security legislation aimed at alleged Communist infiltration in the public school system. Under the provisions of that act, the Board of Regents for the State of New York was empowered to make a list of subversive organizations. Membership of a teacher employed in a public school in any of the listed organizations constituted prima facie evidence of disqualification.

The *New York Times* had attacked the Feinberg law as a "blunderbuss" bill and had charged that it incorporated in law the dubious proposition that guilt can be determined by one's associations.[11] The New York Court of Appeals, however, took a contrary view, concluding that the law reflected legitimate concern over who should have access to the teaching profession. In effect, it viewed the enactment as

> an effort by the Legislature to insert a new strand in the mesh by which a screening process is accomplished in the selection of those who teach the State's children.[12]

The majority further concluded there was no violation of due process since the provisions of the statute were reasonably related to the harm

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[9] 350 U.S. 497 (1956).

[10] N.Y. EDUC. LAW §§ 3021–22 (McKinney 1953).

[11] As the *New York Times* noted in an editorial:

> Before the measure was finally approved at Albany this newspaper attacked it as a "blunderbuss" bill and warned that the Legislature was "enacting into law the untenable and illiberal theory of guilt by association." In the three years since then we have seen no reason to alter that opinion.

N.Y. Times, Mar. 5, 1952, at 28, col. 1.

[12] Thompson v. Wallin, 301 N.Y. 476, 489, 95 N.E.2d 806, 811 (1950).

the legislature sought to prevent.[13]

The constitutionality of the act was also defended as a rational limitation on a privilege which in no way constituted a deprivation of any right which could be properly claimed by the petitioner. Another advocate of the right-privilege distinction was Holmes, who, in *McAuliffe v. Mayor and Board of Aldermen of New Bedford*,[14] had written: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[15] So it was with public school teachers; the New York court's position was that public employment is a privilege conditioned by any reasonable restrictions the legislature may choose to enact. It is not, the argument went, a right which can be exercised at one's own insistence.[16]

Upon appeal to the Supreme Court, Chief Justice Vinson, with Justices Minton, Clark, Burton, Reed and Jackson, voted in conference to affirm; Justices Douglas and Black urged that the Court reverse the decision. Justice Frankfurter elected to pass.[17]

The Chief Justice assigned the case to Justice Minton, who began drafting an opinion which adhered rather closely to the reasoning employed by the lower court. Justices Black and Douglas began to prepare dissents. But shortly before either Justice Minton's opinion or either of the dissents were circulated, Justice Frankfurter moved to marshal the Court on a jurisdictional disposition of the case and circulated an eleven page memorandum among the Justices. The memorandum, later reprinted as his dissenting opinion, was accompanied by a short exhortation:

> Narrow division on a serious question is always a matter of regret and therefore, if fairly avoidable, to be avoided. Therefore, I venture to ask careful consideration of what I really believe to be the proper method of disposing of the case, however strong may be the convictions as to the merits on either side of the what was discussed at the Bar.[18]

Justice Frankfurter believed the "proper method" whereby the case should be disposed was to dismiss the appeal on jurisdictional grounds. He took the position that the issues presented were abstract and specu-

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[13] 301 N.Y. at 489–90, 95 N.E.2d at 811–12.

[14] 155 Mass. 216, 29 N.E. 517 (1892).

[15] *Id.* at 220, 29 N.E. at 517.

[16] *See* note 74 *infra* & text accompanying.

[17] Justice Sherman Minton's file re Adler v. Board of Education (The Sherman Minton Papers, The Truman Library).

[18] Letter from Felix Frankfurter to the Conference, Feb. 25, 1952 (The Sherman Minton Papers, The Truman Library).

lative because the Feinberg law had not yet caused the dismissal of any teacher in the New York school system.[19] The plaintiffs' standing had been based on their interest under New York law in enjoining the wasteful expenditure of funds by a municipal agency. However, Frankfurter contended that the New York rule on standing to raise a constitutional question was at variance with the established practice of the Supreme Court under article III. His effort proved unsuccessful and the conference vote remained unchanged.

The petitioner's brief (prepared in part by Arthur Garfield Hays) and the amicus brief filed by the American Civil Liberties Union argued that the individuals affected by the Feinberg law were denied rights protected by the first amendment. Justice Minton found this contention unpersuasive:

> If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere . . . .
> . . . His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice.[20]

Although Justice Minton may have somewhat overstated the freedom of choice which, as a practical matter, is available to teachers, he closely paralleled Holmes' reasoning in *McAuliffe* when he conceded that such persons have the right under our law "to assemble, speak, think, and believe as they will." But "it is equally clear that they have no right to work for the State in the school system on their own terms."[21] Thus, Minton took the position that, although the state government cannot deny the privilege of government employment in an arbitrary manner, it can impose reasonable qualifications for that employment.

The question presented, then, was whether loyalty was a proper criterion for government employment. As has been noted by one of Justice Minton's clerks, the answer might depend on the nature of the employment involved.[22] Justice Minton's answer in the instant case was emphatic:

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[19] Inasmuch as Justice Frankfurter did not believe the issues had ripened into an actual case or controversy, he concluded the Court was in effect being asked to offer an advisory opinion. His intense aversion to advisory opinions was in large part premised on historical Supreme Court practice, the need for an actual injury to assist in the formulation of precise issues, and the value of oral argument on those issues. *See* Frankfurter, *A Note on Advisory Opinions,* 37 HARV. L. REV. 1002 (1924).

[20] 342 U.S. 492–93.

[21] *Id.* at 492.

[22] Memorandum re Adler v. Board of Education, undated (The Sherman Minton Papers, The Truman Library).

> A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society cannot be doubted.[23]

Assuming, as the Court did, that loyalty is a proper criterion for employment, the hard question in *Adler* was whether membership in a subversive organization was material evidence of disloyalty. In answer to that question, Justice Minton said, "from time immemorial, one's reputation has been determined in part by the company he keeps."[24]

Justice Douglas in dissent accused the majority of determining guilt by association.[25] A passage in one of Justice Minton's preliminary drafts, later deleted, directly addresses this charge.

> This is not guilt by association. No one is charged with any criminal offense. Guilt in a criminal sense is personal; but as surely as guilt is personal, association is material to the inquiry here. Association, when shown to be with organizations that advocate the overthrow of government by force or violence, is a material consideration of fitness and qualification for employment in the school system.[26]

Moreover, the Feinberg law was applicable only to persons who had knowledge of the subversive purposes for which the organization they had joined was formed. It is perhaps not unreasonable to rebuttably presume that persons who join organizations with knowledge of organizational activities sympathize, at least to some extent, with those activities. As a further precaution against administrative impropriety, the act guaranteed a hearing where the presumption of disqualification could be rebutted by the introduction of substantial contrary evidence.[27]

The preamble to the Feinberg law contained an elaborate allegation of Communist subversion in the New York public school system. The American Civil Liberties Union in an amicus brief consequently main-

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[23] 342 U.S. at 493.

[24] *Id.*

[25] 342 U.S. at 508–09.

[26] Justice Sherman Minton's file re Adler v. Board of Education (The Sherman Minton Papers, The Truman Library).

[27] As revealed in his notes on the case, Minton understood the Act to provide that, if a teacher did not resign his position within ten days following the publication of the list of subversive organizations, evidence of membership prior to the date of publication was deemed presumptive evidence of disqualification to teach.

tained that the preamble constituted a bill of attainder.[28] However, as his notes indicate, Justice Minton was never in the least impressed with this argument. The preamble, of course, enacted nothing and was in no way a part of New York's education law. Justice Minton's opinion thus supported the exercise of state power, and denied that the Constitution was a barrier to the exercise of state power to control internal subversion.

The calculus of the competing interests presented in *Adler* likewise concerned the dissenters. It should be recognized that Justice Douglas was concerned with the dangers "inherent" in subversive elements within public school faculties. In the second version of his dissent (deleted in the final draft), he indicated a possible ground for the discharge of subversive teachers.

> The function of the teacher is to explore to the edges of problems, to push inquiry to the horizon, to search for truth unfettered by dogma. It may be that a Communist who is teaching in some fields would be unable to meet this high standard. It may be that her indoctrination in the conspiratorial role of the Comintern would cause her to pervert some subjects. In that case I think it clear that she could be discharged or disciplined for failing to meet appropriate professional standards.[29]

Justice Douglas emphasized in his early drafts that the Feinberg law did not employ the test so stated nor did it condemn teachers on the basis of disloyal acts. Instead, he believed it worked on the simple and dangerous premise of guilt by association.

There was yet another deletion in Justice Douglas's second circulated dissent (which was his published opinion). His first dissent related the rising importance of the public school to the disintegration of the family. As the institutional importance of the family has declined, the "burden carried by the school has increased proportionately." He therefore thought it especially important that the guarantee of the first amendment be safeguarded in the schools.[30]

Federal Pre-emption

State security regulation was also at issue in *Pennsylvania v.*

[28] Brief of the American Civil Liberties Union as Amicus Curiae at 19–20, Adler v. Board of Educ., 342 U.S. 485 (1952).

[29] Letter from William O. Douglas to the Conference, Mar. 1, 1952 (The Sherman Minton Papers, The Truman Library).

[30] Letter from William O. Douglas to the Conference, Feb. 29, 1952 (The Sherman Minton Papers, The Truman Library).

Nelson,[31] where the respondent's state court conviction was reversed.[32] Respondent was prosecuted under the Pennsylvania Sedition Act which the Supreme Court held had been superseded by federal legislation, including the Smith Act of 1940[33] and the Internal Security Act of 1950.[34]

In sustaining a decision by the Supreme Court of Pennsylvania to reverse Nelson's conviction, the majority, per Chief Justice Warren, discussed at length the "tests of supersession." The Court held, first, that the federal regulatory scheme was sufficiently pervasive to pre-empt state legislation. According to the Court the broad congressional enactments covering subversive activities indicated a corresponding congressional intent to completely occupy the field. The Court also held that federal interest in this area was dominant enough to pre-empt corresponding state enforcement. Seditious conduct was an indispensable matter of national concern; it was therefore not a proper subject for the exercise of state police power. The majority argued that the Pennsylvania legislation, if enforced by the state, presented the probability of administrative conflict with the agencies charged with supervising the federal security programs.[35] The Court found an analogous situation in labor-management relations, where the Court had previously warned of the rise of diverse and confusing tribunals and procedures sometimes inherent in the doctrine of concurrent jurisdiction.

Justices Minton and Burton joined Justice Reed's dissent, which voiced thorough disagreement with each of the "tests of supersession" adopted by the majority. In the first place, the dissenters remained unpersuaded that federal antisubversive legislation was indeed so pervasive it occupied the field to the exclusion of state regulation. The "occupancy of the field" concept was derived from the old commerce clause cases, but there the concept had successfully prevented the erection of local trade barriers inimical to a national commerce.[36] In contrast, the federal sedition laws were criminal statutes. Certain designated acts were subject to punishment prescribed by the federal government. There was thus no "general congressional regulatory scheme" which

[31] 350 U.S. 497 (1956).

[32] *See generally* J. SCHMIDHAUSER, THE SUPREME COURT AS FINAL ARBITER IN FEDERAL-STATE RELATIONS, 1789–1957, at 190–91 (1958); Hunt, *State Control of Sedition: The Smith Act as the Supreme Law of the Land*, 41 MINN. L. REV. 287 (1957).

[33] 18 U.S.C. § 2385 (1970).

[34] 50 U.S.C. §§ 781–826 (1970).

[35] 350 U.S. at 514.

[36] *See, e.g.*, Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851).

the states could upset.[37] The assumption of federal dominance sufficient to preclude state regulation was also questioned. Under the long established doctrine of dual citizenship, Americans are citizens both of the United States and of the respective states wherein they reside. The duty to protect the rights and liberties of citizenship, including protection from seditious disorder, rests with both the states and the federal government. And since both the states and the federal government share in the effort to protect themselves and their citizens from disruptive influences, it is anomalous to speak of the dominance of the federal government. Their interests are concurrent and complementary, argued the dissent, for both have a substantial interest in protecting themselves and their citizens from sedition. Although the majority found there was a grave probability state enforcement might hamper or in some way infringe on the enforcement of federal law, this finding did not persuade the dissenters, who felt that the assertion was inadequately supported by the available evidence.[38]

Unquestionably the dissenters disagreed with every majority contention. Although they were applauded by those interested in promoting states' rights, the dissenters were engaged in no mere apology for a point of view. The opinion in which Justice Minton joined cannot be so easily dismissed. As was so often evident in Justice Minton's positions, hard technical questions lay only partly submerged below his conclusions. The majority's opinion was fraught with weaknesses. Its quest for congressional intent seemingly ignored the explicit language found in the Smith Act; its reliance on the "occupancy of the field" doctrine, which was developed in another context, labeled the result but concealed the reason for the Court's prior use of the phrase in the commerce clause cases; its use of the analogy with the labor-management cases was inapt because those cases were unrelated to the criminal law statutes at issue in *Nelson*; and its citation of authority was inadequate to support the finding of conflict between state enforcement and the administration of the federal program. For all of these reasons, the position taken by the dissenters, while it need not be accepted, cannot be cavalierly disregarded.

Even though Justice Minton did not assume the primary responsibility for drafting a dissent in *Nelson*, Justice Clark has suggested that the views expressed in Justice Reed's dissent were typical of Justice Minton's general response to constitutional problems involving national

[37] 350 U.S. at 514.
[38] *Id.* at 518–19.

security.[39]

COMMUNISM, ADMINISTRATIVE ARBITRARINESS, AND JUDICIAL REVIEW

Loyalty and Citizens

Dennis v. United States,[40] the first and lesser-known case involving the General Secretary of the American Communist Party, Eugene Dennis, raised questions concerning the right to a fair trial. Dennis was convicted of willfully refusing to obey a subpoena which had been served on him by the House Un-American Activities Committee. Seven government employees sat on the District of Columbia jury which convicted him. Dennis contended he had not received a fair trial because of the inevitable impact the federal loyalty check had on all government employees. A government employee who voted for the acquittal of a known Communist would, Dennis argued, put his own reputation in jeopardy. As Justice Minton wrote in his private papers, Dennis was "really tried for being a Communist—not for refusing to appear."[41]

In an opinion by Justice Minton, the Court refused to presume the jurors were biased merely because they were government employees. Bias could not be presumed; it must be actual. This distinction should not go unchallenged. Although jurors sometimes admit actual bias, they rarely do so. Many challenges to jurors are based on an unarticulated assumption that, given certain circumstances, there is an unreasonable risk an accused person will not receive a fair hearing from a particular juror. Consequently, most challenges are necessarily based on presumed bias because the factual determination of actual bias is usually impossible.[42]

According to Justice Minton, the lower court's record demonstrated a willingness to consider any evidence indicating that government agencies had investigated government employees in retaliation for their votes to acquit. No convincing evidence of such was advanced by the petitioner at trial. Nor did the record disclose any widespread appre-

[39] Interview with Justice Tom C. Clark, Aug. 19, 1969.

[40] 339 U.S. 162 (1950).

[41] Justice Sherman Minton's file re Dennis v. United States (The Sherman Minton Papers, The Truman Library).

[42] 339 U.S. at 172. Justice Minton's conclusion—that the presence of government employees on the jury did not deny the right of trial by an impartial jury within the meaning of the sixth amendment—was arguably consistent with the position taken by the Court in United States v. Wood, 299 U.S. 123 (1936). There it was argued, on the authority of Blackstone, that even as the King's servant could not serve on a jury, so also was a government employee disqualified from jury duty. Chief Justice Hughes' opinion for the Court took the position that the Commentaries, properly read, did not support the argument. *Id.* at 138–39.

hension among the government employees themselves that a verdict of acquittal would either endanger their tenure or provoke an investigation. Justice Minton refused to "take judicial notice of a miasma of fear to which Government employees are claimed to be peculiarly vulnerable . . . ."[43] The record disclosed nothing which detracted from the assumption that the "individual integrity by which men judge men" was exercised by all parties to the verdict.[44]

The general rule that government employees serving on juries were not chargeable with implied bias had been stated in *United States v. Wood*[45] and reaffirmed in *Frazier v. United States*,[46] over Justice Jackson's dissent.[47] The tone of the Jackson opinion in *Frazier* contrasted strangely with the communication he sent to Justice Minton after reading the *Dennis* opinion.

> I concur in the result. I shall probably need to say a few words, in view of my dissent in *Frazier*. But what I say will not disagree with your reasoning. Maybe if I wait until the dissent is out I can take care of a few of its points that you would not want to take a shot at.
>
> You have done a good job and I don't think they can poke any holes in what you have written.[48]

Justice Jackson thought it inconceivable that an accused Communist should be allowed to exclude government employees from a jury when no other group subject to investigation was accorded a like privilege. He consequently refused to mitigate the impact of a general rule with which he totally disagreed.[49]

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[43] 339 U.S. at 172.

[44] *Id.*

[45] 299 U.S. 123 (1936).

[46] 335 U.S. 497 (1948).

[47] Recalling *Frazier*, Jackson later promised that "[w]henever any majority can be mustered to overrule that wierd and misguided decision, I shall be one of it." Dennis v. United States, 339 U.S. 162, 173 (1950) (concurring opinion).

[48] Letter from Robert H. Jackson to Sherman Minton, Dec. 15, 1949 (The Sherman Minton Papers, The Truman Library).

[49] Justice Jackson's position was not dissimilar from the sentiment expressed in a letter Justice Minton received from an Indiana attorney.

> I have just finished reading your opinion in *Dennis v. United States*. I believe it is a good start towards laying to rest a dogma which seems to have had some strength, that is, that a member of a minority party is entitled not only to equal rights, but to superior rights. In our zeal to give an unpopular minority equal rights, we have, or at least some of us have applauded them in their effort to seek superior rights. Under the facts as set out in your opinion, the Defendant in the Dennis case was clearly guilty of a crime, and to let him off because he was not granted superior rights in the selection of a jury would seem to me to be a miscarriage of justice.

Letter from Glenn D. Peters to Sherman Minton, Apr. 18, 1950 (The Sherman Minton Papers, The Truman Library).

In two other cases, *Cole v. Young*[50] and *Service v. Dulles*,[51] the Court severely limited the scope of certain provisions in the National Security Act[52] which permitted summary dismissals.[53] Understood in the narrowest sense, *Cole* presented a question of statutory interpretation. The Act empowered department heads in the federal government to dismiss civilian employees "in the interest of the national security of the United States."[54] As passed, the Act was applicable only to those agencies and departments specified by Congress. However, section 3 of the Act provided that the President could extend the Act to other agencies and departments when he deemed such action "necessary in the best interests of national security."[55] Acting upon this authority, the President extended the Act "to all other departments and agencies of the Government."[56]

The meaning of this congressional delegation of power came into issue when Kendrick M. Cole, an obscure food and drug inspector in the Department of Health, Education and Welfare, was suspended from his post while an investigation of his activities was pending. Allegedly he associated with Communists and belonged to a subversive organization.

The Court's majority understood the Act to be applicable only to

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This view did not attract universal approval. Justice Frankfurter circulated a Memorandum, only part of which was later incorporated in his dissent, which fervently opposed Justice Jackson's position.

> To recognize the existence of what is characterized as a phobia against a particular group of accused is not to discriminate in its favor. If a particular group, no matter what its belief, is under pressure of popular hostility which is bound to bear down more heavily upon jurors selected from one section of the community compared with others, to exclude potential jurors peculiarly susceptible to such pressure, and therefore, subject to bias, is not to pay regard to political opinions or affiliations but merely to recognize, as law should, the facts of life. It does not follow that because members of different but respected political parties can sit in judgment upon one another where punishment is involved, that all members of such parties, no matter what their relation to an operating bias, can freely and fairly sit in judgment upon those belonging to a despised or ostracized group. It was a wise man who said that there is no greater inequality than the equality of unequals.

Letter from Felix Frankfurter to the Conference, Mar. 24, 1950 (The Sherman Minton Papers, The Truman Library).

[50] 351 U.S. 536 (1956).

[51] 354 U.S. 363 (1957). Justice Minton was not on the Supreme Court when this case was decided.

[52] 5 U.S.C. §§ 3571, 7531, 7532 (1970).

[53] *Cole* was one of the last cases in which Justice Minton participated. His views were made explicit in a dissent which he withheld from publication, preferring at the last moment to concur in Justice Clark's dissent.

[54] 351 U.S. at 538, quoting 5 U.S.C. § 7532 (1970).

[55] *Id.* at 542.

[56] *Id.*

those civilian officers and employees in sensitive positions. An employee could not be dismissed unless he was found to be subversive and employed in a sensitive position by the federal government. It was the inclusion of this latter requirement that caused Justice Clark to contend that the government might thus remain honeycombed with subversives despite congressional and presidential efforts to be done with them.[57]

In his unpublished dissent, Justice Minton raised two difficult questions. First, did Congress intend to restrict the effect of the National Security Act to sensitive agencies? Second, did the majority's interpretation of the scope of the National Security Act substitute a judicial determination for a presidential judgment which was contrary to legislative intentions?

> I cannot agree that Congress limited the National Security Act to the so-called sensitive agencies. If it had so intended it would have stopped with the enumeration of the sensitive agencies. But it went further and left it to the President's judgment as to what other agencies the Act should be extended. This was the President's judgment, not ours, nor that of anyone else. The Court now says that this Court may tell the President to what agencies the Act shall be extended. This is substituting our judgment for that of the President.[58]

With regard to the first issue, Justice Minton attributed to the Congress a firm determination to remove all subversives from government employment. Elsewhere in his dissent he stated:

> There is no reason to believe that Congress intended that disloyal persons were to be free from the provisions of the Act wherever they were. I do not believe Congress intended that any place in the Federal Government should be [a] "snug harbor" for Communists. If I have understood the purpose and intention of Congress it was to root out Communists in Government as summarily as possible.[59]

In addition to his fear that the Court's interpretation of the National Security Act effectively dredged such a "snug harbor," Justice Minton was also clearly displeased with what he viewed to be the majority's judicial gloss on a presidential decision. Justice Minton felt that where the President acts in accordance with a legitimate delegation of congressional power, and the exercise of congressional power is not

[57] *Id.* at 566.

[58] Justice Sherman Minton's unpublished dissent, Cole v. Young (The Sherman Minton Papers, The Truman Library).

[59] *Id.*

challenged, presidential discretion may not be countermanded except when, as exercised, it clearly violates the Constitution. Justice Minton was not persuaded the President had in this case exceeded his constitutional prerogatives.

In both *Dennis* and *Cole*, Justice Minton approved of procedures which sought to control subversive elements within the federal government. Although, as indicated by his file on the *Dennis* case, he knew Dennis was prosecuted because he was a Communist, he found no provision in the Bill of Rights restricting the manner in which the prosecution was conducted. He neither questioned Congress' power to act as it thought desirable on behalf of national security, nor did he question the wisdom of congressional action. When he believed Congress had made its intention clear, he regarded any gloss on that intention by the judiciary as a usurpation of congressional power. Consequently, congressional prerogatives in matters of national security were not subject to judicial restrictions.

Loyalty and Aliens

The province of liberty protected by the due process of law is a region subject to shifting boundaries. With the nation engaged in World War II, Congress passed legislation permitting the cancellation of naturalization certificates belonging to those naturalized citizens whose conduct since the date of their naturalization proceedings indicated that they had not taken the oath of allegiance in good faith. If permitted to stand, as drafted such legislation would have put naturalized citizens under a "whip of administration" not shared by natural born citizens.[60] In *Schneiderman v. United States*,[61] the equity standard of "clear, unequivocal, and convincing" proof was adopted in denaturalization proceedings and the burden of proof was expressly put upon the Government. A principal accomplishment of the libertarians on the Roosevelt Court was to ensure the protection of due process rights claimed by naturalized citizens.[62]

Nearly a decade later, the Supreme Court was also concerned with the nature of the liberty which could be claimed by those born on foreign shores. In a series of cases involving the rights of aliens, the Court explored the due process clause only to determine that it offered little protection to aliens and none at all to those who were seeking

[60] C. SWISHER, THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES 183 (2d ed. 1963).

[61] 320 U.S. 118 (1943).

[62] *See* C. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 102-08 (1954).

entry into the country. A detailed examination of *United States ex rel. Knauff v. Shaughnessy*[63] illustrates the dynamics of Justice Minton's approach to some of the problems arising from alienage.

Few cases in the Supreme Court's recent history have attracted as much attention as did *Knauff*. The case was decided against the background of frantic national concern over the detection of alleged Communist sympathizers. Extensive files maintained by the Department of Justice held information allegedly sufficient to prevent the entry of Ellen Knauff, an alien, into the United States. She was judged undesirable by the Department of Justice and was accorded neither notice of nor a hearing on the substance of the charges filed against her. As an alien, she was not accorded the elementary safeguards of the fifth amendment guaranteed to all "persons." When she failed to gain admission to the courts, the Department of Justice took immediate steps to effect her deportation from the United States.

Justice Jackson Acts

Acting in his capacity as Circuit Justice for the Second Circuit, Robert H. Jackson, on May 17, 1950, only minutes before Mrs. Knauff's scheduled departure, issued an order staying her deportation.[64] Bristling with indignation, the order reviewed the circumstances which had led to Mrs. Knauff's application for a stay order that had been denied by the court of appeals at four o'clock on the previous day.

Soon after the court of appeals had refused Mrs. Knauff's prior habeas corpus petition, the Department of Justice had made known its intention to deport Mrs. Knauff on an airplane scheduled to leave New York City by 11 o'clock the next morning. When Justice Jackson granted the stay it was his understanding that Mrs. Knauff's deportation was only minutes away and that preparations for her departure had already been completed.

Had the Department of Justice been allowed to accomplish its purpose, the Supreme Court would have been without jurisdiction to consider Mrs. Knauff's habeas corpus petition on appeal since she would no longer have been within the country.[65] Furthermore, an effort then underway in the Congress to cancel her deportation would have

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[63] 338 U.S. 537 (1950).

[64] Robert H. Jackson, Order of May 17, 1950. The Order was circulated to the Conference. (The Sherman Minton Papers, The Truman Library.)

[65] *Compare* Act of Feb. 5, 1867, 14 Stat. 385 *with* the present statute, 28 U.S.C. § 2241(a) (1970) (federal courts have power to grant the writ "within their respective jurisdictions").

been frustrated. Although opposed by the Department of Justice in a subcommittee of the Judiciary Committee, the bill to allow Mrs. Knauff to remain in the country had been favorably reported and had thereafter been unanimously adopted in the House of Representatives. Similar legislation had been introduced in the Senate.

The evidence offered by Justice Jackson to support his grave accusation that the Department of Justice was seeking to avoid the Court's jurisdiction and frustrate the legislation then pending in Congress was based on newspaper reports. Although he was ordinarily unwilling to place principal reliance on journalistic accounts, the suddenness of events had in this case necessitated his dependence on this source of information. Justice Jackson was particularly impressed by a remark appearing in the *Baltimore Sun* attributed to a government attorney who, after the court of appeals had suggested an appeal to the Supreme Court, had allegedly replied, "She may not be here then."[66] The *New York Herald Tribune* had reported that the government attorney had predicted that the case would soon be academic since Mrs. Knauff would be deported by the time any action could be taken. Similarly, the same attorney had been quoted as saying, "There are no legal impediments at this time which would prevent her immediate deportation."[67]

The Department of Justice had at no time given any explanation for their determination to exclude Mrs. Knauff from the United States. Despite the shroud of secrecy drawn over the case, Justice Jackson could not persuade himself that national security would be jeopardized even infinitesimally if Mrs. Kanuff were allowed to remain in the country for at least a few additional days. She was, accordingly, permitted sufficient time to ready her habeas corpus petition for presentation before the Supreme Court.

Standing the Test of Security

Justice Jackson's prompt action on May 17 preserved the Court's jurisdiction to hear argument on the effect of this national security legislation, on which authority the Attorney General had acted. When the *Knauff* case was discussed in conference, the vote was four to three for affirming the Second Circuit's denial of habeas corpus. Justices Clark and Douglas did not participate. Chief Justice Vinson and Justices Minton, Burton, and Reed voted to affirm while Justices Jackson, Frankfurter, and Black voted to reverse. Chief Justice Vinson assigned

[66] Order, *supra* note 64.
[67] *Id.*

the case to Justice Minton. It was his first civil liberties opinion, and one of the most celebrated and representative civil liberties opinions handed down by the Vinson Court.

Justice Minton's opinion in *Knauff* has been criticized for asking the wrong question, a question which retained its initial phrasing in all the preliminary versions of the opinion.[68] It was whether the United States could exclude, without a hearing, the alien wife of a United States citizen solely upon the recommendation of the Attorney General that her admission would be prejudicial to the best interest of the United States. But the real problem may have been how two apparently irreconcilable congressional policies could best be harmonized. The President had been given extensive power to exclude aliens who were security risks. A later policy, reflected in the War Brides Act, relaxed strict immigration policies in favor of war brides whom soldiers had married while overseas.

Justice Minton's approach to these conflicting congressional policies was to resolve the problem into an issue of statutory interpretation. In effect, he denied that the policies were in conflict by emphasizing a clause in the War Brides Act which stated that an alien wife, even though physically or mentally defective, could join her civilian husband "if [she was] otherwise admissible under the immigration laws."[69] This clause was used by Justice Minton to undercut the War Brides Act, since Mrs. Knauff had already been declared inimical to the best interests of the United States by the Attorney General.

Two dissents were circulated, one by Justice Frankfurter and another by Justice Jackson. Justice Frankfurter's dissent, circulated five days before the Court's decision was handed down, was critical of Justice Minton's approach to the statutory interpretation problem. The removal of the exclusion bar against alien wives and children, even including the mentally and physically defective, "was a bounty afforded by Congress not to the alien . . . but to the citizen who had honorably served his country." Mrs. Knauff was thought to be at least entitled to a hearing, for an intense cross-examination of only a few minutes is sometimes sufficient to dissipate unfounded allegations. Justice Frankfurter regretted that Justice Minton had read the War Brides Act in a literal and decimating spirit. He further feared that the Court's interpretation made Congress appear to have subjected a nonquota im-

[68] *See* Braden, *Mr. Justice Minton and the Truman Bloc*, 26 IND. L.J. 153, 156–57 (1951).

[69] 338 U.S. at 546.

migrant like Mrs. Knauff to the "hazardous gauntlet of an informer's tale without any opportunity for its refutation."[70]

Justice Jackson's dissent was extensively critiqued for Justice Minton by one of his clerks. The criticisms to which Justice Jackson's dissent was vulnerable indicate both the liabilities of impassioned rhetoric and the strength of Justice Minton's own tightly reasoned opinion.

"I do not find that Congress has authorized such abrupt and brutal exclusion of the wife of an American citizen, whatever it may have permitted to aliens generally," concluded Justice Jackson. The marginal comment was: "This does not follow; Jackson nowhere attacks our conclusion that war brides were to be treated like all aliens as far as security is concerned."[71]

Justice Jackson assumed that "the Army in Germany is not without a vigilant and security-conscious intelligence service." The question then put by Justice Minton's clerk was: "How do we know this? It is not in the record." Justice Jackson further noted: "The marriage of this woman to an American citizen was approved by the Commanding General at Frankfurt-on-Main." The marginal rejoinder was: "What inference are we to draw from this? That the military authorities found Ellen a good security risk? Would such an inference be justified without proof of the extent of the military's investigations, et cetera?"[72]

The Government's position was stated as follows in Justice Jackson's dissent:

> And the Government tells the Court that not even a court can find out why the girl is excluded. But it says we must find that Congress authorized this treatment of war brides and even if we cannot get any reason for it, we must say it is legal; security requires it.

The answer was: "The Government's position is that Congress authorized this treatment not only of war brides, but of all aliens during the emergency."[73]

Thereupon, Justice Jackson drafted one of his most eloquent passages:

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[70] Felix Frankfurter to the Conference, Jan. 11, 1950 (The Sherman Minton Papers, The Truman Library).

[71] Robert H. Jackson to the Conference, Jan. 9, 1950 (The Sherman Minton Papers, The Truman Library).

[72] *Id.*

[73] *Id.*

> Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is nothing compared to the menace to free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on secret evidence that security will not allow to be brought to light in hearings. The plea that evidence of guilt must be secret is abhorent to free men, because it provides a cloak for the malevolent, the misinformed, the corrupt, and the busy body to play undetected and uncorrected the role of informer.

To which the clerk replied: "All well and true, but the majority proves by unquestioned precedent that this has no application to the situation in this case, that is, an alien seeking the *privilege* of admission to the United States."[74]

A final passage in Justice Jackson's dissent concluded the exchange:

> It is enough to say that Congress will have to use more explicit language than any yet cited before I will agree that it has authorized an administrative officer to exile an American citizen, or break up his family, except for serious misconduct. Likewise, it will have to be much more explicit before I can agree that it authorized a finding of serious misconduct against the wife of an American without notice of charges, evidence of guilt and a chance to meet it.

Again, the clerk's answer denied the validity of the assumption upon which the dissent proceeded: "As the majority point out, the fact that Ellen is the wife of an American citizen is no ground of distinction; she must be treated as any other when seeking admission."[75]

In effect, then, Justice Minton's holding was that an alien seeking admission to this country under the War Brides Act could be excluded by executive fiat without a hearing. Professor Hart was sufficiently aroused to declare Justice Minton's assertion that any procedure outlined by Congress was due process for an alien to be a "patently preposterous proposition."[76]

Justice Minton's result may be accepted, however hesitantly, as a general requirement of national security at a time of cold war hostility and international suspicion; so also, the status of one seeking admis-

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[74] *Id.* Such a view would command little adherence today, of course. On the continuing validity of the right-privilege distinction, *see, e.g.*, L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 369 (1965).

[75] *Id.*

[76] Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1392 (1953).

sion for the first time may be legitimately distinguished from a resident alien, who is entitled to a minimum protection of procedural due process. Mrs. Knauff "had to stand the test of security" and this "she failed to meet."[77] In the context of the hour, the request was perhaps not unreasonable, although the risk of monstrous abuse may well be acknowledged.

There was no question about the existence of a clear precedent in *Ekui v. United States*,[78] which supported the use of power by the sovereign to forbid the entrance of aliens. National self-preservation and the long established custom of international law provided persuasive justifications for the rule. The Attorney General had sufficient power to prevent Mrs. Knauff from entering the country, and that alone was at issue.

Censure and Praise

On Monday, January 23, 1950, Justice Minton was advised of an extremely critical editorial appearing in the *Chicago Sun-Times*. The editorial contrasted Justice Minton unfavorably with his predecessor, Wiley B. Rutledge, who had frequently disagreed with the three Justices concurring with Justice Minton in *Knauff*: Justices Burton and Reed and Chief Justice Vinson. Justice Minton posted a letter to the *Sun-Times*. Referring first to the editorialist's willingness to contrast his work with that of Justice Rutledge, Justice Minton wrote, "Where I line up is not of much importance, but it is important as to whether I am right in what I decide. That I try to be, irrespective of which line I get in."[79]

He then directed his attention to the charge which had most annoyed him, the insinuation that the petitioner had "gotten a raw deal." If so, Minton wrote,

> it is something Congress fully authorized. I have always believed that this Court has no power to legislate, and I certainly believe it now as strongly as when I fought the old Court because we thought it was using its power to legislate. I considered it then and still consider it an usurpation of power to do so.[80]

A copy of the Court's opinion was enclosed with the letter

> in order that you may find the data therein as to the War Brides

[77] 338 U.S. at 547.
[78] 142 U.S. 651 (1892).
[79] Letter from Sherman Minton to Russell Stewart, Jan. 23, 1950 (The Sherman Minton Papers, The Truman Library).
[80] *Id.*

> Act referred to with such assurance in the editorial as relaxing immigration restrictions. You will find that we set forth the War Brides Act and the only four instances in which Congress relaxed the immigration restrictions. The four provisions never helped Mrs. Knauff in the least. She was still subject to the rest of the immigration law as laid down by Congress and the regulations promulgated by the President pursuant to the act of Congress. It is quite apparent that whoever wrote the editorial had never seen the opinion.[81]

The denouement was promptly forthcoming. The reporter who had written the offending editorial was told to prepare a memorandum defending it. The memorandum was sent to Justice Minton along with a deferential letter from Richard J. Finnegan, editor of the editorial page. The letter referred to the reporter as a "thoughtful, earnest chap . . . who had managed to come up with the idea that the most important person in the whole proceeding was the soldier, rather than the bride whom he married."[82] There the controversy ended, but Justice Minton had shown some evidence of sensitivity to public criticism.[83]

Over a year later, on March 28, 1951, Justice Minton was advised of an editorial published on that date by the *Christian Science Monitor*. The *Knauff* case was not at an end. After some thirty months on Ellis Island she had been accorded a hearing where she had been confronted with the specific charges against her. By unanimous verdict, the Board of Special Inquiry had officially denied her entry into the country. The Justice Department's long refusal to disclose the basis for its exclusion order reflected the Department's continuing effort to protect the sources of antiespionage information. "The battle for individual liberties," concluded the *Monitor*, "must be fought, more often than not, in behalf of doubtful cases."[84]

However, on the following day, March 29, the Board of Special Inquiry reversed its decision, which was approved on November 1 by the Attorney General. With the exception of two months, Ellen Knauff had spent all of her time on Ellis Island since August, 1948. She had, despite adversity, used her time profitably during this period of detention: in

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[81] *Id.*

[82] Letter from Richard J. Finnegan to Sherman Minton, Feb. 7, 1950 (The Sherman Minton Papers, The Truman Library).

[83] Not all reactions to the *Knauff* opinion were so unfavorable. Apparently Minton had discussed the case with Senator Richard Russell at lunch shortly after it had been delivered and had thereafter sent him a complimentary copy. "When it comes to emoting," Senator Russell answered, "I think the dissents are fine, but the opinion of the majority is much sounder law." Letter from Richard B. Russell to Sherman Minton, Feb. 7, 1950 (The Sherman Minton Papers, The Truman Library).

[84] *Christian Science Monitor*, Mar. 28, 1951, at 14, col. 2 (central ed.).

1952 she published her biography, which relates in detail the facts in a case later characterized by Justice Jackson as "a near miss, saved by further administrative and congressional hearings from perpetrating an injustice."[85]

Beyond Knauff

A further extension of the principle in *Knauff* was rejected by the Court in *Kwong Hai Chew v. Colding*[86] over Justice Minton's lone dissent. In *Kwong Hai Chew*, the petitioner was a resident of the United States whereas in *Knauff* the petitioner had been a nonresident alien. Minton dissented without opinion, but it seems apparent that he could not accept the basis for the distinction which the rest of the Court found persuasive. The petitioner in *Kwong Hai Chew*, by the majority view, was entitled to procedural due process under the fifth amendment, which provided him with the right to notice of the charges against him and subsequent hearing with an opportunity to confront his accusers.[87]

Relying on Justice Minton's opinion in *Knauff*, the Court later reaffirmed, in *Shaughnessy v. United States ex rel. Mezei*,[88] the view that a nonresident alien is not entitled to procedural due process. The Supreme Court's opinion found support in the dissenting opinion by Judge Learned Hand in the court of appeals. The argument went something like this: No alien can approach our shores calm with the certainty of acceptance. There is always the risk of rejection. It makes no difference that an alien is without a country to which he can return; it in no way affects his status. Each man must know that, in the event he is denied permission to come ashore, "he must find an asylum elsewhere; or, like the Flying Dutchman, forever sail the seas."[89] The *Mezei* decision was much criticized, since it emphasized the limited application of *Kwong Hai Chew*.[90] Mezei, although an alien, had resided in

[85] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 225 (1953) (Jackson, J., dissenting).

[86] 344 U.S. 590 (1953).

[87] *Id.* at 596–97.

[88] 345 U.S. 206 (1953).

[89] 195 F.2d 964, 971 (2d Cir. 1952) (Hand, J., dissenting).

[90] *See* PRITCHETT, *supra* note 62, at 117–18 (1954). Justice Frankfurter wrote as follows to Justice Black:

> I am writing regarding Bob's dissent in the *Mezei* case, which I assume you have seen or will see. He says things that you and I wouldn't say as he says them, and he says some things that I wouldn't say at all. But as a whole, his opinion strikes me as a powerful protest against the brutality of reversal in this case. (I am not saying the majority are brutal. I am saying the result of what they are doing is brutal, needlessly brutal, because this situation is precisely what habeas corpus is for.) I hope very much Bob will be able to speak for the four of us. It seems to me that the most effective way for driving home our dissent

the United States for 28 years. He had left the country for only a short time to visit his dying mother in Rumania. By so doing he achieved the status of a nonresident alien. Arguably, Mezei's position was more similar to an alien subject to deportation proceedings, in view of his long residence in the country, than to an alien seeking entry for the first time. Had the case been thus considered, Mezei would have at least been entitled to procedural due process. As it was, he was entitled to nothing.

Nonetheless, the statute on which the Court relied was indeed subject to a geographic interpretation. In a literal sense, Mezei was an alien, coming from Rumania, seeking entry to the United States. His entry was barred for reasons of national security. Judge Learned Hand summarized the matter with his customary eloquence:

> Think what one may of a statute based upon such fears [of aliens], when passed by a society which professes to put its faith in the free interchange of ideas, a court has no warrant for refusing to enforce it. If that society chooses to flinch when its principles are put to the test, courts are not set up to give it derringdo.[91]

CONCLUSION

The great preponderance of the civil liberties cases decided in the 1950's expressed results which Justice Minton favored. In confrontations between the government and the individual, he was dependably on the side of the government, if the government's position represented an attempted implementation of a legislative decision and if the legislature, in arriving at its decision, had not exceeded the grant of power delegated to it by the Constitution. Justice Minton, perhaps more than any other member of the Court, tended to acquiesce in legislative judgments even when those judgments severely restricted the range of individual freedom. Consequently, the short term impact of his views was substantial, for they were, for a little while, the law of the land.

Justice Harlan once said that Justice Minton did not believe in the incorporation theory, which was first advanced by his grandfather, the first Justice Harlan.[92] Nor did Justice Minton invoke the notion of due

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is to speak with a single voice, particularly when Bob's voice is as charged as it is with moral indignation and lays bare so effectively the silliness, as well as the injustice of doing what is being done.

Although Justice Frankfurter joined in Justice Jackson's dissent, Justice Black elected to file his own dissent, in which Justice Douglas joined. Letter from Felix Frankfurter to Hugo L. Black, Feb. 19, 1953 (The Felix Frankfurter Papers, Library of Congress).

[91] 195 F.2d at 971.

[92] Interview with Justice John Marshall Harlan, Jan. 30, 1968. Paradoxically, before

process mechanically in predetermined fact patterns. On the contrary, he infrequently used due process to invalidate the acts of state governments. Due process was an ambiguous concept which he identified with fundamental fairness. Justice Minton's position on the meaning of due process was not dissimilar from the views expressed by Justice Cardozo[93] and Justice Frankfurter.[94] With reference to a state case, he commented

his nomination Judge Minton had endorsed Justice Black's theory of total incorporation of the Bill of Rights into the due process clause of the fourteenth amendment, during the course of a book review for the INDIANA LAW JOURNAL. Minton, Book Review, 24 IND. L.J. 299, 302 (1949).

[93] *See, e.g.*, Palko v. Connecticut, 302 U.S. 319 (1937).

[94] *See* the opinions of Justices Frankfurter and Black in Adamson v. California, 332 U.S. 46 (1947). Long before the clash of ideas in *Adamson*, Justice Frankfurter had carefully articulated his position. The following letter clearly indicates the nature of his commitments:

> For nearly twenty years I was at work on what was to be as comprehensive and as scholarly a book on the Fourteenth Amendment as I could make it. That book was aborted when I came down here, and now there is nothing to show for those twenty years except the poor things in my head and a mass of largely illegible notes. But my sense of the importance of the relation of the Fourteenth Amendment to the development of the democratic process in this country has certainly not abated since coming here. And so, I will trouble you with spelling out a little bit more closely than I had a chance yesterday the problem which concerns us both so very much.
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> 1. Beginning with the first consideration by this Court of the reach and meaning of the Fourteenth Amendment—I mean of course the *Slaughterhouse Cases* —successive Courts have divided.
>
> 2. So long as the Fourteenth Amendment is part of our Constitution it seems to me unjustifiable to hope that fluctuating divisions about its scope will not continue in the future as they have in the last seventy years, so long as the due process clause is given more than a procedural content.
>
> 3. Once you go beyond a procedural content and pour into the generality of the language substantive guaranties, it is to me inconceivable that any kind of definition of the substantive rights of the guaranty will not repeat in the future the history of the past, namely will according to the makeup of the Court give varying scope to the substantive rights that are protected—and so I spent practically my mature lifetime, until I came on the Court, in adding my feeble efforts toward maintaining a conscientious observance by the Court of what I conceive to be the very narrow scope of the Court's power to strike down political action. My starting point is, of course, the democratic faith on which this country is founded—the right of the democracy to make mistakes and correct its errors by the organs that reflect the popular will—which regards the Court as a qualification of the democratic principle and desires to restrict the play of this undemocratic feature to its narrowest limits. I am aware that men who have power can exercise it—and too often do—to enforce their own will, to make their will, or if you like their notions of policy, the measure of what is right. But I am also aware of the forces of tradition and the habits of discipline whereby men entrusted with power remain within the limited framework of their professed power. More particularly, the history of this Court emboldens me to believe that men need not be supermen to observe the conditions under which judicial review of political authority—that's what judicial review of legislation really amounts to—is ultimately maintainable in a democratic society. When men who had such background and such relation to so-called property interests as did, for instance, Waite, Bradley, Moody, Holmes, Brandeis and Cardozo, showed how scrupulously they did not write their private notions of policy into the Constitution,

on the nature of due process:

> As in all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of each case. The pattern here, long in use in North Carolina, does not deny the fundamental essentials of a trial, "the very essence of a scheme of ordered justice," which is due process.[95]

The impact of Justice Minton's long term contributions to constitutional development in the area of civil liberties has been less

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then I am not prepared to say that all that a court does when it adjudicates in these constitutional controversies is an elaborate pretense, and that judges do in fact merely translate their private convictions into decisions and call it the law and the Constitution.

I appreciate the frailties of men, but the War is for me meaningless and Hitler becomes the true prophet if there is no such thing as law different from and beyond the individuals who give it expression. And what I am thinking about is that if each temporary majority on this Court—and none is very long—in fact merely regards its presence on this Court as an opportunity for translating its own private notions of policy into decisions, the sooner an educated public opinion becomes aware of the fact the better not only for truth but also in the true interests of democracy. For myself I think the years that are ahead make more and not less important the tribunal for which the wise founders of this country provided, acting however within the very narrow limits within which it was deemed appropriate that it should function.

4. As I understand it, you find restrictions against the exercise of unbridled power by fluctuating majorities on this Court, so far as the Fourteenth Amendment is concerned, in what you deem to be the specific provisions of the Bill of Rights. I should be very happy to be able to tie down by specific provisions that would bind them judges who, for one reason or another, are not so disciplined as were Waite and Bradley and Holmes—assuming that what I call dialectics, namely the resourcefulness of interpretation, does not give room for the widest variants in the interpretation even of specific provisions. But I am truly eager for understanding this matter, and therefore should be grateful to you if you will refer me to the materials which justify one in saying that the general language of the Fourteenth Amendment was in fact a compendious statement of some or all of the earlier first nine Amendments. Are all nine so incorporated? Did the Fourteenth Amendment establish uniform systems of judicial procedure in all the states and freeze them for the future, both in criminal and in civil cases, to the extent that the Constitution does for federal courts? Is it conceivable that an amendment bringing about such a result would either have been submitted to the states, or, if submitted, would have been ratified by them? And if not all the nine Amendments, which of the prior nine Amendments are to be deemed incorporated and which left out?

5. Believe me that in writing this nothing is farther from my purpose than contention. I am merely trying to get light on a subject which has absorbed as much thought and energy of my mature life as anything that has concerned me. I ask you quite humbly to lead me to the materials that show that the Fourteenth Amendment incorporated by reference the provisions—any or all—of the earlier nine amendments.

Needless to say there is no hurry about this. Whenever you feel inclined to help educate me, I shall be grateful.

Felix Frankfurter to Hugo L. Black, Nov. 13, 1943 (The Felix Frankfurter Papers, Library of Congress).

[95] Brock v. North Carolina, 344 U.S. 424, 427–28 (1953).

favorably assessed. C. Herman Pritchett has argued that

> what the Vinson majority frequently failed to exhibit [was] a warm humanitarian sympathy, a conviction that libertarian values are tremendously important, an insistence that the Court use the full measure of its legitimate power to compel adherence to procedural safeguards, and a tough-minded scrutiny of the plausible rationalizations which are always available to explain away infringements of human liberty.[96]

If the criticism seems uncomfortably harsh, perhaps it can be somewhat tempered by recalling what Judge Learned Hand once noted privately to Justice Frankfurter: "So much of what we do is not a case of *barbara celarent* anyway; but of more or less."[97] Cases before the Supreme Court were not there because they admitted of only one possible answer. It was, instead, always a question of "more or less" in holding the delicate balance between the social interest in individual freedom and the social interest in the general security.

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[96] PRITCHETT, *supra* note 62, at 238.

[97] Letter from Learned Hand to Felix Frankfurter, Mar. 30, 1949 (The Felix Frankfurter Papers, Library of Congress).